

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN BRIAN VINT,

Defendant-Appellant.

UNPUBLISHED

December 12, 2013

No. 312759

Cass Circuit Court

LC No. 12-010049-FC

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84; carrying a weapon with unlawful intent, MCL 750.226; and two counts of possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 80 months to 10 years' imprisonment for the assault with intent to do great bodily harm conviction, 40 months to 5 years' imprisonment for the carrying a weapon with unlawful intent conviction, and two years' imprisonment for each felony-firearm conviction. Defendant appeals by right and raises issues related only to sentencing. We affirm.

Defendant's convictions stem from his intentional shooting of Trevor Claire on January 22, 2012. At trial, defendant raised the affirmative defense of self defense. The jury acquitted defendant of assault with intent to commit murder, MCL 750.83, but it convicted him of the lesser offense of assault with intent to do great bodily harm, carrying a weapon with unlawful intent, and two counts of felony-firearm. The recommended minimum sentence range under the legislative guidelines was 29 to 57 months' imprisonment for the assault with intent to do great bodily harm conviction and 7 to 23 months' imprisonment for the carrying a weapon with unlawful intent conviction. The trial court exceeded these guidelines. The trial court articulated the following factors to support the departure: (1) the aggravated nature of defendant's conduct was not considered by the guidelines; (2) the extent of Claire's physical injuries were not adequately taken into account by offense variable (OV) 3; (3) Claire's psychological injuries exceeded the scope of OV 4; and (4) the change in the victim's familial relationship was not adequately addressed in OV 4.

We address first defendant's argument that the trial court erred in scoring OV 9, MCL 777.39, at 10 points to reflect that he placed two to nine victims in danger of physical injury. Defendant contends that zero points should have been assessed for OV 9.

Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).]

MCL 777.39(1)(c) requires that ten points must be scored under OV 9 if "[t]here were 2 to 9 victims who were placed in danger of physical injury" For purposes of scoring OV 9, MCL 777.39(2)(a) directs the trial court to "[c]ount each person who was placed in danger of physical injury or loss of life . . . as a victim." Thus, the plain language of the statute directs that the term "victim" is not limited to the defendant's intended victim but it also includes those placed in danger during the commission of the offense. *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004). In this case, the trial court found that two or more people were in danger of physical injury because more than two people were in close proximity at the time defendant fired his weapon. The record supports that defendant fired his .380 caliber pistol that was loaded with hollow-point ammunition in an enclosed pole barn. Aside from defendant and Claire, three other people were present inside of the barn at the time of the shooting. Gary Fletcher was standing right next to Claire when he was shot, and he was close enough to catch Claire before he fell to the ground. Consequently, a preponderance of evidence supports that at least two people were placed in danger of physical injury at the time the crime was committed. Therefore, the trial court did not clearly err when it scored OV 9 at 10 points.

Defendant's main argument on appeal is that the trial court's upward departure from the guidelines was an abuse of discretion. Specifically, he argues that the trial court's departure was based on factors that were not objective and verifiable and were already taken into account by the sentencing guidelines. We disagree. This Court reviews the trial court's determination of the existence or nonexistence of a particular factor for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). The trial court's determination that objective and verifiable factors present in the particular case constitute a substantial and compelling reason to depart from the guidelines range is reviewed for an abuse of discretion. *Id.*

A trial court is required to choose a minimum sentence within the guidelines unless there is a substantial and compelling reason to depart from them. MCL 769.34(2); *People v Johnigan*, 265 Mich App 463, 468; 696 NW2d 724 (2005). The trial court may depart from the recommended range but must articulate on the record substantial and compelling reasons for doing so. MCL 769.34(3); *Babcock*, 469 Mich at 256, 267-268, 272. A substantial and compelling reason is an objective and verifiable reason that "keenly" or "irresistibly" grabs the court's attention and is of considerable worth in deciding the length of the sentence. *Id.* at 257-258, 272; *People v Young*, 276 Mich App 446, 449-450; 740 NW2d 347 (2007). The trial court may not base a departure on characteristics already considered by the guidelines unless it finds that the characteristics were given inadequate or disproportionate weight. MCL 769.34(3)(b);

Babcock, 469 Mich at 267-268, 272. We conclude that the trial court did not clearly err by finding that there were objective and verifiable reasons that were not adequately considered in the scoring of the guidelines, nor abuse its discretion determining that these factors justified an upward departure from the guidelines recommended minimum sentence range. *Id.* at 264-265.

In justifying its departure, the trial court first referred to the aggravated nature of defendant's conduct. The trial court specifically articulated that defendant shot Claire in the abdomen and leg at point-blank range with a pistol that contained hollow-point bullets. The trial court further stated that defendant could have avoided the confrontation, yet he shot Claire despite the fact that defendant only faced the "possible" threat of physical assault. The trial court's reasons for departure were objective and verifiable by evidence in trial and sentencing record. *People v Anderson*, 298 Mich App 178, 185; 825 NW2d 678 (2012). Further, defendant's argument that the trial court's reasons for departure with respect to defendant's use of a gun were already taken into account by the sentencing guidelines is without merit. While OV 1, MCL 777.31, OV 2, MCL 777.32, and OV 3, MCL 777.33, take into account that the victim was shot and injured, they do not necessarily adequately account for the fact that the victim was injured by being shot at point-blank range. See *People v Lowery*, 258 Mich App 167, 171-172; 673 NW2d 107 (2003). Therefore, while the fact that defendant fired a gun at Claire does not justify departure, the fact that defendant fired shots that hit and injured Claire is not accounted for by the guidelines and can justify departure. *Id.* Further, particularly aggravating circumstances can justify departures from the guidelines. *People v Merriweather*, 447 Mich 799, 807; 527 NW2d 460 (1994). Here, because defendant initiated an assault on Claire and shot him twice at point-blank range with hollow-point bullets even though defendant faced only a claimed "possible" threat of assault, we conclude that these aggravating circumstances are not adequately considered under the guidelines and justify an upward departure from the guidelines. *Id.*

The next basis for the trial court's departure was that Claire's "devastating" physical injuries were not adequately considered in OV 3. The trial court assessed 25 points for OV 3 because "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). In articulating its reasons for departure, the trial court acknowledged that OV 3 accounted for Claire's injuries, but it stated that the guidelines provided insufficient weight given "the devastating injuries and pain inflicted" on Claire. The trial court referred to the fact that Claire had a one-percent chance of surviving the gunshot wounds he sustained because of the damage to one of his arteries. It also stated that "the gun shot wounds caused liver damage, artery damage, loss of a kidney, [and] left a bullet lodged in the spine in a position too dangerous to remove." The trial court further noted, that Claire's "survival, such as it is, is riddled with major surgery and constant challenge to survive. Nine months after the shooting he is still unable to eat and [is] fed through a tube. The quality of his future life has been substantially diminished." The trial court also stated that, after the shooting, Claire remained in the hospital for a total of six months and then was placed in a rehabilitation center after he was released. The trial court also referenced the cost of Claire's medical bills to illustrate how devastating his injuries were. These reasons for departure are objective and verifiable and supported by evidence in the record. *Anderson*, 298 Mich App at 185. While repercussions from crimes that are to be expected do not usually constitute substantial and compelling reasons to depart from the sentencing guidelines, if the repercussions are a wide deviation from the norm, they can be substantial and compelling reasons for departure. *Anderson*, 298 Mich App at 187. Here, the trial court did not clearly err by finding that Claire's serious and long-lasting injuries constituted

a “wide deviation from the norm,” *id.*, nor abuse its discretion by finding that they were not given adequate weight by the guidelines. *Babcock*, 469 Mich at 264-265. Therefore, an upward departure from the guidelines was justified. *Id.* at 267-268, 272; MCL 769.34(3)(b).

The trial court also articulated that Claire’s psychological injuries suffered by the victim and the victim’s family were not given adequate weight. The trial court assessed 10 points for OV 4 because “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). During sentencing, the trial noted that the offense had “devastating consequences on Trevor Clare, as well as his family.” In departing from the guidelines, the trial court found that the guidelines did not adequately account for the psychological injuries, and in particular invoked the “the recitation and comments” of Kevin Clare, the victim’s uncle, who spoke at sentencing about the trauma and mental turmoil the victim’s injuries caused his entire family. A victim impact statement by Kevin Claire is also included in the Presentence Investigation Report. That report states that the victim’s mother began taking anxiety medications, the victim’s daughter required counseling and medication, and the offense took a tremendous toll on the victim’s family. We conclude that this evidence supported the trial court’s finding that OV 4 did not adequately account for the psychological injuries suffered by the victim and his family. See *Anderson*, 298 Mich App at 188-189. These facts are also objective and verifiable because they were based on the record. *Id.* at 185. The trial court did not abuse its discretion concluding that the crime’s effect on Claire’s family was not adequately considered under OV 4 and justified a departure from the guidelines. *Id.* at 188-189; *Babcock*, 469 Mich at 264-265, 267-268, 272; MCL 769.34(3)(b).

In reaching our conclusion, we reject defendant’s argument that the trial court erred by finding that Claire’s physical and psychological injuries were not adequately accounted for by the application of OV 3 and OV 4. Essentially, defendant argues, citing *Young*, 276 Mich App at 449-450, that the trial court was required to consider what defendant’s minimum sentence would be if OV 3 and OV 4 were scored at zero, and then compare this score to that of the properly scored offense variables. We find that this argument misinterprets *Young* and is without merit.

Defendant next argues that the trial court’s sentence was disproportionately severe and, therefore, constituted an abuse of the trial court’s discretion. The “statutory guidelines require more than an articulation of reasons for a departure; they require justification for the *particular* departure made.” *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008) (emphasis in original). “A sentence cannot be upheld when the connection between the reasons given for departure and the extent of departure is unclear.” *Id.* at 304. Here, the trial court made it perfectly plain that the horrendous nature of the crime and its tremendous impact on the victim and the victim’s family justified the imposition of the maximum punishment permitted.

To satisfy the principle of proportionality, a sentence must reflect both the seriousness of the crime and the defendant’s criminal history. *Smith*, 482 Mich at 304-305; *Babcock*, 469 Mich at 254, 264. “[E]verything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.” *Babcock*, 469 Mich at 263. In this case, the trial court determined that the seriousness of the offense and its impact on the victim and his family far outweighed the mitigating effect of defendant’s limited criminal history. We must accord the trial court’s determination some degree of deference. *Id.* at 269. Consequently, we

cannot find that the court's decision was outside the range of principled outcomes, and thus the sentences the trial court imposed were not an abuse of discretion. *Id.* at 269-270.

We affirm.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Cynthia Diane Stephens